

Signed and Filed: September 28, 2018



Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
EDITH YEE TUK WONG,) No. 14-30880 DM
) Chapter 7
Debtor.)
ERIC TONG,) Adversary Proceeding
Plaintiff,) No. 14-03114
v.)
EDITH YEE TUK WONG,)
Defendant.)

**MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR
ATTORNEY'S FEES AND COSTS AS PREVAILING PARTY**

On August 24, 2018, this court held a hearing on the motion by debtor and defendant Edith Yee Tuk Wong ("Wong") to recover attorney's fees and costs incurred in defending a nondischargeability action commenced against her by plaintiff Eric Tong ("Tong"). After taking the matter under submission and considering the record and arguments of counsel, the court concludes that Wong is not entitled to recover her attorney's fees under governing California law. Nonetheless, as Tong has already

1 agreed to pay a certain amount of fees (\$16,114.00) directly
2 relating to the adversary proceeding, the court will not revisit
3 that concession. The remaining fees (\$14,788.00) sought by Wong
4 are not recoverable from Tong for the reasons set forth below.

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6 I. Factual Background

7 In 2008, Wong (as seller) and Tong (as broker) entered into a
8 listing agreement for the sale of Wong's property located on
9 Irving Street in San Francisco (the "Property"). The agreement
10 provided in paragraph 15 that "[i]n any action, proceeding or
11 arbitration between Seller and Broker regarding the obligation to
12 pay compensation under this Agreement, the prevailing Seller or
13 Broker shall be entitled to reasonable attorney fees and costs
14 from the non-prevailing Seller or Broker, except as provided in
15 paragraph 19A." See Exhibit A to the Complaint for Determination
16 of Debt ("Complaint"); AP Dkt. 1, ECF pg 13.

17 In 2014, Wong filed the underlying bankruptcy case and Tong
18 commenced this adversary proceeding to obtain a determination that
19 his claims against Wong were nondischargeable under 11 U.S.C.
20 § 523(a)(2), which excludes from discharge debts arising from
21 false pretenses, false representation, or actual fraud. In the
22 Complaint, Tong alleged that he had procured a ready and willing
23 buyer, but subsequently learned that Wong had misrepresented the
24 condition of the Property and had not disclosed citations for
25 housing violations, among other things. Tong further alleged that
26 the misrepresentations and nondisclosures resulted in the loss of
27 the sale to which Wong had agreed, and he sought as damages the
28

1 anticipated compensation he would have received but for Wong's
2 purported misrepresentations.

3 According to paragraph 45 of the Complaint, Tong's claims
4 against Wong were at issue in a pending arbitration proceeding
5 that was stayed upon the filing of the bankruptcy petition by
6 Wong. In the prayer of the Complaint, Tong sought "a
7 determination that any arbitration award made to Tong under the
8 Listing Agreement be deemed nondischargeable under 11 U.S.C. §
9 523(a)(2)." *Id.*

10 The parties thereafter agreed that the arbitration should
11 proceed, so on July 20, 2015, this court entered an order granting
12 relief from the automatic stay so that could happen (See Dkt. 27
13 in Case No. 14-30880). On May 8, 2017, the arbitrator found that
14 Tong had failed to sustain his burden of proof that Wong either
15 negligently or intentionally failed to make certain disclosures.
16 See AP at Dkt. 9-1. He concluded that Wong was not liable to
17 Tong and that he would take nothing from her. These same purported
18 non-disclosures were the basis of Tong's allegations of fraud or
19 fraudulent representations in the Complaint.

20 Following the arbitration ruling, counsel for Tong conceded
21 at a status conference that he would no longer pursue the
22 nondischargeability action. On August 24, 2018, this court
23 entered a judgment (1) dismissing the Complaint, (2) stating that
24 Wong was entitled to her costs, and (3) directing Wong to file
25 forthwith her motion for determination of the amount and
26 reasonableness of her attorney's fees.

27 Wong's counsel thereafter filed the underlying motion for
28 recovery of \$30,902.00 in attorneys' fees associated with the

1 arbitration and the adversary proceeding, as well as fees
2 associated with his representation of Debtor in the main
3 bankruptcy case (such as the amendment of schedules).¹

4 Tong opposed the motion to the extent Wong sought fees for
5 services rendered by her counsel (1) in defending matters
6 commenced by third parties and in representing Wong in Rule 2004
7 examinations by those third parties; (2) in representing Wong in
8 the arbitration involving multiple parties and issues, not just
9 those presented in this adversary proceeding; (3) in rendering
10 services in connection with the administration of her main
11 bankruptcy case; and (4) in rendering services in connection with
12 certain California Superior Court cases in which Wong was a named
13 as a defendant. He did not oppose the award of attorneys' fees
14 and costs in the amount of \$16,114.00. See AP Dkt. 17, ECF pgs.
15 2-3.

16 On August 24, 2018, the court held a hearing on Wong's motion
17 and took the matter under submission. On September 4, 2018, Wong
18 filed a motion to vacate the submission and to permit supplemental
19 briefing. The court granted that motion on the same day [Dkt. No.
20 24, and took the matter under submission upon the filing of Tong's

21 ¹In the final footnote to the motion for attorneys fees,
22 counsel for Wong "elected to dispense with a separate memorandum
23 of points and authorities." See Defendant's Motion for Attorney's
24 Fees and Costs as Prevailing Party, Dkt 12, p. 5, fn. 5.
25 "Suffice as to say the Defendant Wong's Motion is premised on [the
26 listing agreement] itself, California Civil Code section 1717, and
27 the *Travelers*, *Penrod*, and *Bos* cases as cited and explained [in a
28 2017 status conference statement]." *Id.* Apart from this
statement, Wong did not set forth any legal basis for recovery of
fees in her motion and reply. She did discuss relevant legal
authorities in her supplemental memorandum (AP Dkt. 26) filed
after the hearing and after the matter had been initially taken
under submission by the court.

1 supplemental brief on September 12, 2018.

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3 II. Discussion

4 As Wong acknowledged in her motion, she is seeking recovery
5 of her fees pursuant to section 1717 of the California Civil Code.
6 Section 1717 provides, in relevant part:

7
8 In any action on a contract, where the contract
9 specifically provides that attorney's fees and costs,
10 which are incurred to enforce that contract, shall be
11 awarded either to one of the parties or to the
12 prevailing party, then the party who is determined to be
13 the party prevailing on the contract, whether he or she
14 is the party specified in the contract or not, shall be
15 entitled to reasonable attorney's fees in addition to
16 other costs.

17 Cal. Civ. Code § 1717(a).

18 In *In re Penrod*, 802 F.3d 1084, 1087 (9th Cir. 2015), the
19 Ninth Circuit identified the three prerequisites for the recovery
20 of attorney's fees under section 1717: (1) the underlying action
21 must be an action on the contract; (2) the contract must have
22 contained a clause providing for payment of attorneys' fees; and
23 (3) the party seeking recovery of fees must have prevailed in
24 matter. *Id.* Here, only the first prerequisite is at issue:
25 whether the underlying nondischargeability action was an action on
26 the contract. The court finds that it was not.

27 The Ninth Circuit has held that a nondischargeability action
28 is "on a contract" within section 1717 if "the bankruptcy court
need[s] to determine the enforceability of the ... agreement to
determine dischargeability." *In re Baroff*, 105 F.3d 439, 442 (9th
Cir. 1997). "[I]f the bankruptcy court did not need to determine
whether the contract was enforceable, then the dischargeability

1 claim is not an action on the contract within the meaning of
2 [California Civil Code] § 1717." *Bos v. Bd. of Trustees*, 818 F.3d
3 486, 489 (9th Cir. 2016), quoting *In re Davison*, 289 B.R. 716, 723
4 (9th Cir. BAP 2003) (emphasis added).

5 Here, the underlying claim is an objection to
6 dischargeability based on allegations of fraud, misrepresentation
7 and fraudulent inducement against Wong; there is no breach of
8 contract claim. As stated in Tong's supplemental brief (Dkt. 26
9 at 2:3-12), the "allegations in the instant complaint and in the
10 related arbitration were limited solely to whether [Wong]
11 defrauded [Tong] by inducing him to provide services on a sale
12 that she knew could never have closed."

13 Had the arbitration ended in Tong's favor and this matter
14 proceeded to trial, this court would not have needed to interpret
15 the listing agreement or determine its enforceability in order to
16 determine whether or not Wong had engaged in "false pretenses, a
17 false representation, or actual fraud" under section 523(a)(2)(A).
18 Consequently, under *Bos* and other governing Ninth Circuit law, the
19 underlying section 523 adversary proceeding is not one on the
20 contract and section 1717 is inapplicable. *Baroff*, 105 F.3d at 442
21 (denying fees under section 1717 where "the bankruptcy court did
22 not adjudicate the validity of the note in determining whether the
23 debt was dischargeable," and the note was thus merely "collateral
24 to the non-dischargeability proceeding"); *In re Hashemi*, 104 F.3d
25 1122, 1126 (9th Cir. 1996) (a creditor's "dischargeability claim
26 [was] not an action on the contract," within the meaning of the
27 contract itself, because "the bankruptcy court did not need to
28 'determine the enforceability of the ... agreement to determine

1 dischargeability'").

2 As in *Bos*, this "nondischargeability proceeding arose
3 entirely under the federal Bankruptcy Code," and would not have
4 required this court to determine the issues that were resolved in
5 the arbitration. Recall that the prayer of the Complaint sought
6 only that any award in Tong's favor be found nondischargeable.
7 Once Wong was found to be liable for nothing, there was nothing
8 for this court to try. This nondischargeability action was thus
9 "collateral to a contract rather than 'on a contract,'" and Wong
10 cannot use section 1717 to recover her fees incurred in defending
11 it. *Bos*, 818 F.3d at 490.

12

13 III. Conclusion

14 Counsel for Wong should upload an order directing Tong to
15 reimburse her \$16,114.00 in fees that he has agreed to pay. The
16 order should also reflect that the court is denying payment of the
17 balance of the requested fees (\$14,788.00) for the reasons set
18 forth in this memorandum decision. Unless counsel for Wong agrees
19 to the form of the order, counsel for Tong should file (on the
20 docket) a separate proof of service demonstrating compliance with
21 B.L.R. 9022-1.

22 ****END OF MEMORANDUM DECISION****

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Court Service List

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